STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Ambit Energy, L.P.)	
)	ICC Docket No. 08-0220
Application for Certificate of Petition to)	
Service Authority under Section § 19-110 of)	
the Public Utilities Act.)	

EXCEPTIONS AND BRIEF ON EXCEPTIONS OF THE PEOPLE OF THE STATE OF ILLINOIS

The People of the State of Illinois ("the People"), by and through the Illinois Attorney General, Lisa Madigan, pursuant to 220 ILCS 5/10-111 and 83 Ill.Adm.Code 200.830, hereby file their Brief on Exceptions to the Administrative Law Judge's Proposed Order, dated April 11, 2008.

I. Exception No. 1

The People's first exception is by way of a correction to the Proposed Order, a correction necessitated by a mistake contained in the People's Response to Ambit's Application, filed on April 4, 2008. That response indicated that the Attorney General's Office had served Ambit's registered agent in Illinois with a subpoena on March 31, 2008. In fact, the subpoena was served upon CT Corporation System, the entity listed in Ambit's application as its registered agent in Illinois, on April 1, 2008.

The People will file an Errata to correct this error in the record.

II. Exception No. 2

The People do not challenge the Proposed Order's conclusion that Ambit is licensed to transact business in Illinois. However, we must point out that the record in this case must be corrected with respect to this aspect of Ambit's qualifications as a

certified alternative gas supplier. The subpoena which the People served upon CT Corporation System at 208 S. LaSalle Street, Chicago Illinois 60604, the entity which is listed on Ambit's application as its registered agent here in Illinois, was not accepted by that agent on behalf of Ambit. The Attorney General's Office has learned that CT Corporation System is not Ambit's registered agent in Illinois, and an examination of records filed with the Illinois Secretary of State's Office confirms that as of February 28, 2008, more than three weeks before Ambit filed the application at issue in this docket, the registered agent listed with the Secretary of State was not CT Corporation System, despite the affirmation contained in the March 18th application at issue. Ambit's verified application is false in this regard.

This misstatement must be corrected so that the public, as well as the Commission, is properly informed as to which entity may accept legal process on behalf of Ambit in Illinois.

The subpoena was eventually served again on counsel for Ambit and several Ambit executives. Needless to say, the People are unable to provide the Commission with any further information regarding Ambit's compliance with Illinois law, as the Administrative Law Judge suggested we might do in these exceptions, because the Attorney General's Office has only recently been able to complete service on Ambit and has not yet received any responses to its subpoena.

III. Exception No. 3

The People take exception to statements included in the first full paragraph on page 11 of the Proposed Order. Those statements indicate that the AG is troubled that

Ambit sells gas through "consultants" and that this indicates that Ambit is involved I a pyramid or Ponzi scheme. Proposed Order at 11.

The People have never stated that the Attorney General is concerned that Ambit sells gas through consultants, and has never alleged that Ambit is involved in a pyramid or Ponzi scheme. Rather, the People's filings in this case state only that the Attorney General's Office "...is in possession of information that may be relevant to the veracity of Ambit's verified assertions of compliance..." with applicable laws, as set forth in paragraphs 5 and 12 of its Application. AG Response at para. 8-9. The People also stated that based on that information, the Attorney General's Office issued a subpoena to Ambit and is conducting an investigation into whether Ambit's sales or marketing practices "...are or would be in violation of state law." AG Response at para. 9. The Proposed Order should be changed to correctly reflect the People's position with respect to its concerns about Ambit's application for certification as an alternative gas supplier.

Proposed Language:

The People request that the following modification be made to the first full paragraph appearing on page 11 of the Proposed Order:

The AG and CUB are <u>is</u> troubled that Ambit sells gas through its "consultants," who receive remuneration for "signing up" more consultants. This, they <u>CUB</u> maintains, indicates that Ambit is involved in a pyramid or a Ponzi scheme.

IV. Exception No. 4

The People must take exception to the inclusion in the Proposed Order of the analysis addressing the legality of pyramid or Ponzi schemes, as well as the prohibition on compensation for the recruiting of consultants recommended by the Administrative

Law Judge, as contained on pages 11 and 12, under the title "Marketing Through 'Consultants'". This analysis contains discussions of, and references to, the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, and the Illinois Criminal Code, 720 ILCS 5/1-1 *et seq.*

While we appreciate what appears to be a sincere effort made by the Administrative Law Judge to ensure that Ambit complies with laws designed to regulate sales practices such as she describes, the Commission lacks the authority to interpret or enforce the Illinois Consumer Fraud and Deceptive Practices Act ("CFA") or the Criminal Code. Enforcement of the CFA lies with the Attorney General's Office and the offices of the State's Attorney and in the circuit courts of this state. See generally, 815 ILCS 505/3, 815 ILCS 505/4, 815 ILCS 505/5. Enforcement of the state's Criminal Code lies with the offices of the State's Attorney and the Attorney General's Office.

The Public Utilities Act specifically states:

It is hereby made the duty of the Commission to see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the State therefore recovered and collect, and to this end it may sue in the name of the People of the State.

220 ILCS 5/4-201.

We note in particular that nothing in the Proposed Order convinces us that the Attorney General's concerns about Ambit are now resolved or that the investigation of Ambit and its sales and marketing practices should not move forward. We therefore cannot endorse those recommendations made by the Administrative Law Judge for the jurisdictional reasons explained above.

Finally, the People maintain that because the Attorney General believes that sufficient doubt exists concerning Ambit's compliance with state law, in that the company's assertions with respect to compliance with Sections 19-110(e)(5) and 19-115(b)(2) of the Public Utilities Act may not be credible, we must urge the Commission to deny Ambit's application.

Proposed Language:

In accordance with the arguments set forth above, the People recommend that the following modifications be made to pages 11 and 12 of the Proposed Order:

A "pyramid" sales scheme is a plan or operation whereby a person, in exchange for money or other thing of value, acquires the opportunity to receive a benefit or thing of value, which is primarily based upon the inducement of additional persons, by himself or others, to participate in the same plan or operation and is not primarily contingent upon the volume or quantity of goods, services, or other property sold or distributed or to be sold or distributed. (720 ILCS 5/17-7; 815 ILCS 505/1). A person who knowingly participates in a pyramid scheme commits a class A misdemeanor. (720 ILCS 5/17-7). Such a person also violates several federal laws. (See, e.g., Webster v. Omnitrition International, 79 F.3d 775, 781 (9th Cir. 1996)).

The sine qua non of a Ponzi, or pyramid, scheme is emphasis on recruiting new participants into the downline organization with little or no emphasis on the sales or products and services. (*People v. Knop*, 249 III. App. 3d 605, 618, 619 N.E.2d. 203 (2nd Dist. 1993); *Webster*, 79 F.3d at 781 82). Thus, when an organization pays commissions based solely upon recruitment of new members, Illinois courts have held that an illegal pyramid scheme exists. (*See, e.g., People ex rel. Hartigan v. The Dynasty System Corp.*, 128 III. App. 3d 874, 879-81, 471 N.E.2d 236 (4th Dist. 1984)). Also, when the organization's primary emphasis is upon recruitment of downline participants, and not sales, an illegal pyramid scheme exists. (815 ILCS 505/2A). A contract that falls within the statutory definitions of a pyramid scheme is void, as, such a contract violates public policy. (*Scentura Creations v. Long*, 325 III. App. 3d 62, 71-72, 756 N.E.2d 451 (2nd Dist. 2001)).

Here, the percentage of Ambit's income that is generated directly from its consultants is seventeen percent, which is not a high percentage.

(Ambit Ex. 2.0 at 2). This fact is some indication that Ambit's emphasis is on sales, not "signing up" new consultants.

Ms. Gendusa-English stated that that Ambit's consultants receive \$25 (one-fourth of \$100) and \$.05 per therm for every customer they enlist and \$100 for every consultant they enlist. She also stated that Ambit consultants receive remuneration from the consultants they enlists and from the enlisted consultant's customers. Ambit disputes the veracity of many of these averments. But even assuming these allegations are correct, they do not establish that consultants profit more from enlisting other consultants than from sales. For example, if a consultant sold gas to a customer with a very modest gas bill of 100 therms per month, every month, (for purposes of illustration) that customer would generate \$60 in commissions in the first year, $(\$.05 \times 100 = \$5.00 \times 12 = \$60.00)$ and an additional \$25 (25% of the sign-up commission) and \$60 thereafter on an annual basis. Under such a model, it is much more lucrative to "sign up" customers than it is to "sign up" consultants, unless a consultant that is "signed up" is a good sales person who would generate residual fees. Therefore, even given the facts averred by CUB in support of its assertion that Ambit is a pyramid scheme, those facts suggest that Ambit's marketing model emphasizes the sales of its product, not recruiting consultants. The cases cited by CUB, as well as Illinois law, establish that, when a company's major source of income is its sales of real products or services, as opposed to recruitment of downline sales persons, it is not a pyramid or Ponzi scheme. (See, e.g., Webster, 79 F. 3d at 781)

Mr. Chambless stated that Ambit has committed that it shall not pay its consultants commission or other remuneration for enlisting other consultants. (Ambit Ex. 1.0 at 2, 10). According to Ms. Gendusa-English, however, Ambit offers \$100 to a consultant for recruiting another consultant. (See, CUB Ex. 1.0 at 2). It appears as though a genuine issue of material fact exists, which, normally, requires a trial of that issue. (See, e.g., 735 ILCS 2 1005). As was previously noted in the ALJ ruling of April 2, 2008, the 45-55 day statutory requirement for completion of an AGS certification docket does not allow for adjudication of genuine issues of material fact, except, perhaps, for the most simple of issues. That is not the case here.

However, this does not mean that this issue should not be resolved. We conclude that resolution of this issue requires this Commission to require Ambit to offer no remuneration to a consultant for recruiting another consultant. Ambit is free, however, to offer remuneration to a consultant for the fruits of a recruited consultant's customers, since, presumably, under such a scenario, a consultant would be motivated to "sign up" as consultants only those persons who exhibit an ability to sell Ambit's products.

It is also noteworthy that Ambit's "Terms of Service" do not guarantee any particular rate. There is no fee for "signing up" with Ambit and there is no fee for terminating with Ambit. It is written in plain English with important clauses highlighted or underlined.

The People also respectfully request the following modifications to the Proposed Order on pages 13 and 14:

Finding and Ordering Paragraphs

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) the Petitioner, Ambit Energy, L.P., a limited partnership licensed to transact business in Illinois by the Illinois Secretary of State, is seeking authority to operate as an Alternative Gas Supplier pursuant to 220 ILCS 5/19-110;
- (2) the Commission has jurisdiction over Ambit Energy, L.P., and subject-matter jurisdiction;
- (3) the facts recited and conclusions reached in the prefatory portion of this order are supported by the record; they are hereby adopted as findings of fact and conclusions of law;
- (4) in relation to Illinois customers, Ambit Energy L.P. is prohibited from awarding bonuses or commissions or like awards of money or other remuneration, and it is directed to prohibit any related company from, awarding bonuses or commission or like awards of money to its consultants for recruiting new consultants;
- (5) in relation to Illinois customers, Ambit Energy L.P., is directed to require its consultants, marketers, salespersons and all other persons engaged in the marketing or sales of Ambit Energy Lap's services or products to switch service to Ambit Energy L.P. only upon authorization of the switching customer and after fully informing that customer as to Ambit's product;
- (64) for the reasons set forth above, the Application of Ambit Energy, L.P., for certification as an alternative gas supplier in the service territories of the Northern Illinois Gas Company, the Peoples Gas Light and Coke Company and North Shore Gas Company is hereby denied granted;

(7) failure to abide by the terms and conditions in this order could subject Ambit Energy, L.P. to penalties pursuant to 220 ILCS 5/5-202 or 5-203.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Application of Ambit Energy, L.P. for certification as an Alternative Gas Supplier is deniedgranted.

CERTIFICATE OF SERVICE AUTHORITY IS DENIED

IT IS HEREBY <u>ORDERED</u> <u>CERTIFIED</u> that Ambit Energy, L.P.'s application for a certificate of service authority is rejected and the <u>Company</u> is <u>not</u> authorized pursuant to 220 ILCS 19-110 to act as an Alternative Gas Supplier to provide gas to small commercial and residential customers in the service territories of the Northern Illinois Gas Company, the Peoples Gas Light and Coke Company and North Shore Gas Company.

IT IS FURTHER ORDERED that in relation to Illinois customers, Ambit Energy L.P. is prohibited from awarding bonuses or commissions or other remuneration, and it is directed to prohibit any related company from awarding bonuses or commission or other remuneration to its consultants for recruiting new consultants.

IT IS FURTHER ORDERED that in relation to Illinois customers, Ambit Energy L.P. is directed to require its consultants, marketers, salespersons and all other persons engaged in the marketing or sales of Ambit Energy L.P.'s services or products to switch service to Ambit Energy L.P. only upon authorization of the switching customer and after fully informing that customer as to Ambit's product.

IT IS FURTHER ORDERED that failure to abide by the terms and conditions in this order could subject Ambit Energy L.P. to penalties pursuant to 220 ILCS 5/5-202 or 5-203.

IT IS FURTHER ORDERED subject to the provisions of Section 10-113 of the Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

V. Conclusion

For all of the foregoing reasons, the People of the State of Illinois respectfully request that the Commission revise the Proposed Order as set forth herein.

Respectfully submitted,

The People of the State of Illinois by LISA MADIGAN, Attorney General

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